U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12469158

Date: AUG. 3, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a software developer, seeks second preference immigrant classification as a member of the professions holding an advanced degree and as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not qualify for classification as an individual of exceptional ability and had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the

sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In addition to the definition of "advance degree" provided at 8 C.F.R. § 204.5(k)(2), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) provides that a petitioner present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

To demonstrate eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

the foreign national is well-positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or he is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

The Petitioner claims to be a software developer, and states that he intends to "develop integral software for different industries wherever there may be a need for specifically designed software." As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability.[4]

A. Exceptional Ability

The Petitioner contends that he meets at least three of the regulatory criteria for classification as an individual of exceptional ability. In denying the petition, the Director determined that the Petitioner fulfilled only the degree criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) and the ten years of full-time experience criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] Although the Petitioner also asserted eligibility as a member of the professions holding an advanced degree, the Director only analyzed his eligibility as an individual of exceptional ability. We will address his eligibility under both criteria.

In the appeal brief, the Petitioner maintains that he also meets the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), which requires "[e]vidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability," and the recognition for achievements and significant contributions criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).[5]

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Petitioner presented copies of his diploma and transcript, with certified translations, from the [redacted] University of [redacted] demonstrating that he received a bachelor of arts in mathematics in July 1991. We agree with the Director's determination that the Petitioner met this criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

The Petitioner claims that he has been a partner and owner of [redacted] since May 1995, as well as a partner and owner of [redacted] since 2006. The Director determined that the Petitioner met this criterion, based on the submission of three letters from [redacted] and [redacted] Upon review, however, these letters are testimonials from clients of [redacted] and [redacted], and not letters from the employers themselves. Consequently, they do not satisfy the plain language of this criterion.

Though not analyzed by the Director, the record contains a letter from [redacted] who states that he is also a partner and owner of [redacted] and [redacted] Regarding the Petitioner's experience in the occupation of software developer, he states as follows:

> [The Petitioner] has over 24 years of software development experience and has been a partner of [redacted] since 1995 and [redacted] since 2006. On a daily basis, [the Petitioner] is responsible for providing the strategy and direction for [redacted] and [redacted] while developing customized software solutions for our customers. In addition to software development, [the Petitioner] provides physical maintenance of microcomputers and local networks, server management for windows servers, IT management, demand planning, and usage monitoring, as well as local, remote, as well as technical support.

This documentation falls short in demonstrating that the Petitioner has at least ten years of full-time experience in software development. Although the letter indicates that the Petitioner was a partner and owner of the two businesses noted above, the letter does not indicate that the Petitioner's experience as a software developer was "full-time." The letter does not indicate how the Petitioner divided time

[5] While the Petitioner maintains that he has satisfied these criteria on appeal, he does not contest the Director's adverse findings or provide evidence to refute those findings.

among his various business responsibilities as a partner/owner or specify the amount of time he devoted to working full-time as a software developer. Accordingly, the Petitioner has not established that he meets the requirements of this regulatory criterion. The Director's determination to the contrary is withdrawn.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

The Petitioner did not submit any evidence to show that a license or certification is required to practice his profession, or that he possesses such a license or certification. This criterion has not been met.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D).

To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of his claimed exceptional ability relative to others working in the field. The Petitioner submitted a letter from his accountant, listing his annual salary for the years 2014, 2015, 2016 and 2017. He also submitted printouts from [redacted], which contained salary data for the occupations of system developer and software engineer in Brazil.

The Director noted that this documentation was not persuasive, as the submitted documents were not representative of the median salary of the occupation of software developer, the Petitioner's claimed field of endeavor. On appeal, the Petitioner does not contest the Director's determination.

Upon review, we concur with the Director's conclusion. The Petitioner has not offered documentation showing that his earnings are indicative of exceptional ability relative to others performing similar services in the field. Moreover, even if the documents from [redacted] were deemed representative of others performing similar services in the field, we note that the documents are not accompanied by a certified English translation.[6] Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* Because the Petitioner did not submit a properly certified English language translation of the documents, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims. Based on the foregoing, the Petitioner has not demonstrated that he meets this regulatory criterion.

> *Evidence of membership in professional associations.* 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Director found that the Petitioner had not presented evidence showing he belongs to a professional association. His appellate submission does not contest the Director's finding or claim that he meets this criterion.

[6] Although the occupation title and description is stated in English, the remainder of the document appears to be in Portuguese.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F).

The Petitioner submitted support letters from clients, as well as an expert opinion letter, which discuss his career accomplishments and future plans. The Director determined that these letters did not demonstrate that he has received "recognition for achievements and significant contributions to the industry or field," and the Petitioner does not contest the Director's finding on appeal. We agree with the Director's determination that the Petitioner has not met the plain language requirements of 8 C.F.R. § 204.5(k)(3)(ii)(F), as the record is insufficient to demonstrate that he received recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Accordingly, the Petitioner has not shown that he satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification.

B. Member of the Professions Holding an Advanced Degree

The Director's decision did not address the Petitioner's qualifications as an advanced degree professional. On appeal, the Petitioner asserts that he meets this classification by virtue of his "Master of Administration degree, and over 10 years of experience in his respective field."

In order to show an individual is a professional holding an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Petitioner submitted a copy of his diploma and transcript, with certified translations, from the [redacted] University of [redacted] demonstrating that he received a bachelor of arts in mathematics in July 1991. The Petitioner also submitted a certificate indicating that he completed a specialization course in analysis, project, and systems management at the same university in 1996.

The record also contains an "Evaluation of Education and Career Experience" from [redacted], which concludes that the Petitioner holds the equivalent of a U.S. master's degree in software engineering "based upon a combination of Academics and a minimum 5 years Professional experience, as per USCIS." For the reasons outlined below, we are not persuaded by the evaluator's conclusions.

First, the evaluation does not establish that the Petitioner's education alone meets the regulation at 8 C.F.R. § 204.5(k)(3)(i)(A). Although it appears that the Petitioner holds the equivalent of a U.S. bachelor's degree based on his foreign diploma in mathematics and the evaluator's detailed analysis of the accompanying transcript and relevant coursework, the evaluation is insufficient to establish that that the Petitioner holds a foreign master's degree, or its U.S. equivalent.

As noted above, the record contains a certificate indicating that the Petitioner completed a specialization course in analysis, project, and systems management. The "Certificado" is accompanied by a certified translation, which states that the Petitioner "successfully completed the ***Specialization Course in ANALYSIS, PROJECT AND SYSTEM MANAGEMENT*** **at the Lato-Sensu Graduate level.**" (Emphasis in original). Although the evaluator concluded that the Petitioner "was awarded a Master's Degree in Analysis, Projects and Systems Management in 1996," the certificate does not indicate that the Petitioner completed a master's program, and the evaluator provides no analysis or explanation regarding how he determined that the Petitioner's completion of this course represents a foreign master's degree or its U.S. equivalent.[7] The evaluator does not compare the requirements of the specialization course to a U.S. master's degree program, nor does he analyze or discuss the actual coursework completed by the Petitioner. As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we will reject an opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.* The lack of evidence supporting the evaluator's conclusions undermines the credibility of the evaluation.

Moreover, while the evaluator states that the "evaluation relies upon the copies of the original documents of the diplomas, transcripts, and resume provided by" the Petitioner, there is no indication that he reviewed any employment letters to establish the Petitioner's work history or experience.[8] As noted above, the Petitioner submitted a letter from [redacted] his partner and co-owner of [redacted] and [redacted], which stated that the Petitioner "is responsible for providing the strategy and direction" for the companies "while developing customized software solutions for our customers." It also indicated that he "provides physical maintenance of microcomputers and local networks, server management for windows servers, IT management, demand planning, and usage monitoring, as well as local, remote, as well as technical support." This letter, however, is not sufficiently detailed to establish that the Petitioner's entire course of work experience with the aforementioned companies. Other than identifying his job title as "partner," the letter does not confirm his job titles, describe his job duties, or provide the dates of employment for each position he may have held aside from "partner" during the course of his claimed employment with the companies. The information in the aforementioned letter, therefore, is not sufficient to demonstrate that the Petitioner has at least five years of progressive post-baccalaureate experience in software development.

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[7] We note that the translated certificate indicates that the completed course was at the "Lato-Sensu" level. According to the American Association of Collegiate Registrars and Admissions Officers' Electronic Database for Global Education (EDGE), graduate level programs in Brazil "are divided into *Cursos de Aperfeiçoamento* (professional development programs), *Cursos de Especialização* (specialization programs), *Mestrado Profissional* (professional masters), *Cursos de Mestrado* (masters degree programs) and *Cursos de Doutorado* (doctoral programs). Professional development and specialization programs are considered *lato sensus* (wide sense graduate-level programs) and follow independent legislation. Such programs lead toward professional certificates, not graduate degrees. They require either 1 to 2- or 1- to 3- years of study." *See* https://www.aacrao.org/edge/country/brazil (last visited Jul. 15, 2021). We consider EDGE to be a reliable source of information about foreign credential equivalencies. *See Confluence Intern., Inc. v. Holder*, Civil No. 08-2665 (DSD-JJG), 2009 WL 825793 (D. Minn. Mar. 27, 2009); *Tisco Group, Inc. v. Napolitano*, No. 09-cv-10072, 2010 WL 3464314 (E.D. Mich. Aug. 30, 2010); *Sunshine Rehab Services, Inc.* No. 09-13605, 2010 WL 3325442 (E.D. Mich. Aug. 20, 2010). *See also Viraj, LLC v. Holder*, No. 2:12-CV-00127-RWS, 2013 WL 1943431 (N.D. Ga. May 18, 2013).

[8] The job duties listed in the "professional experience" section of the evaluation are taken directly from the Petitioner's resume.

Although the record contains certificates demonstrating that the Petitioner completed two professional certifications in his field, these certificates alone are not sufficient to establish he has the requisite five years of post-baccalaureate experience required by the regulations. One certificate indicates that the petitioner completed a course in BASIC in July of 1986, six years prior to obtaining his undergraduate degree. The duration of this course is not specified. The record also includes a certificate indicating that he completed a 35-hour course in Interbase in July 2001. Upon review, however, these two certificates, one of which was obtained prior to his undergraduate degree and commencement of his claimed employment, are insufficient to demonstrate five years of progressive post-baccalaureate experience in the field of software development.

C. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. As previously outlined, in order to qualify for a national interest waiver, the Petitioner must first show that he qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot.

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as an advanced degree professional or as an individual of exceptional ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.